Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term 1996

STANLEY PLATEK, LASZLO VARGA,
SAM MCCULLOUGH, THOMAS HANEY, SR.,
MARK RIMLINGER, THOMAS VON GEIS,
HARRY WRIGHT, JOHN MALEZI,
FRANK TRIPODI, NICK ROMAN,

v. *Petitioners,*

DUQUESNE CLUB,
A PENNSYLVANIA CORPORATION,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether Section 3(m) of the FLSA, 29 U.S.C. § 203(m), regarding the taking of a tip credit in lieu of payment of the full minimum wage, applies whether or not an employer takes the tip credit.

(2) Whether, even if Section 3(m) does not apply, an employer may divert an employee's property (tips) to its own use when such diversion reduces the employee's regular rate of pay which he receives "free and clear," per 29 C.F.R. § 531.35, below the minimum wage or reduces the amount of overtime compensation that the employee receives "free and clear" below the statutory requirement of time and one-half the regular rate of pay.

(3) Whether the Department of Labor's interpretations of the applicability of Section 3(m), and the applicability of the "free and clear" regulation, 29 C.F.R. § 531.35, vis a vis tips, are reasonable interpretations of the regulation and the FLSA and are thus controlling in this case.

PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Stanley Platek, Plaintiff/Appellant

Laszlo Varga, Plaintiff/Appellant

Sam McCullough, Plaintiff/Appellant

Thomas Haney, Sr., Plaintiff/Appellant

Mark Rimlinger, Plaintiff/Appellant

Thomas Von Geis, Plaintiff/Appellant

Harry Wright, Plaintiff/Appellant

John Malezi, Plaintiff/Appellant

Frank Tripodi, Plaintiff/Appellant

Nick Roman, Plaintiff/Appellant

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Platek et al. v. Duquesne Club, 3 Wage and Hour, Cas. 2d (BNA) 5, 1995 WL 795659 (W.D. PA)

CONCISE STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

The Plaintiffs/Appellants filed a civil action on May 31, 1994, pursuant to the Fair Labor Standards Act in the United States District Court of the Western District of Pennsylvania against their employer, Duquesne Club (the "Club"), a Pennsylvania Corporation. Following the granting of summary judgment in favor of Defendant on several of the counts in two separate memorandum opinions (October 14, 1994, marked as Exhibit 1; December 13, 1995, marked as Exhibit 2) and the dismissal of the remaining counts (Exhibit 3), the Appellants appealed the opinions to the Third Circuit Court of Appeals. The Third Circuit affirmed the District Court's opinions in a Judgment Order on February 5, 1997 (Exhibit 5). A petition for rehearing by the panel and en banc was requested, and the petition was denied April 11, 1997. Appellants now seek review of the Third Circuit's decision by this Court pursuant to 28 U.S.C.A. § 1254 which provides that the Supreme Court may review judgments by the Circuit Courts of Appeal "[b]y writ of certiorari granted upon petition of any party to a civil or criminal case, before or after rendition of judgment or decree." 28 U.S.C.A. § 1254(1) (West 1993).

CONSTITUTION PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

28 U.S.C. § 1331; 29 C.F.R. § 531.27; 29 C.F.R. § 531.35; 29 C.F.R. § 531.52; 29 C.F.R. § 531.55(b); 29 C.F.R. § 531.59; 29 C.F.R. § 531.60(a); 29 U.S.C. § 201; 29 U.S.C. § 203(m); 29 U.S.C. § 203(t); 29 U.S.C. § 213(a)(20); 29 U.S.C. § 216(b); 29 U.S.C.A. § 1254(1) (West 1993); FLSA, P.L. 87-30, 75 stat. 65 (1961); FLSA, P.L. 89-601, 80 stat. 830 (1966); Section 3(m) of the FLSA; Section 3(m)(1); Section 3(m)(2); Section 3(t) of the FLSA; Section 6 of the FLSA; Section 7 of the FLSA; Section 11 of the FLSA; Section 15(a)(2) of the FLSA; Section 16(a)(5) of the FLSA; and Applicable Rules of the Supreme Court of the United States.

CONCISE STATEMENT OF THE CASE SETTING OUT THE PERTINENT FACTS AND THE BASIS FOR FEDERAL JURISDICTION IN THE FIRST INSTANCE

The underlying dispute is founded upon relief sought by the Appellants under the Fair Labor Standards Act, ("FLSA"), 29 U.S.C. §216(b). Original jurisdiction over civil actions arising under federal statutes, such as the FLSA, is conferred upon the district courts of the United States of America, 28 U.S.C.A. §1331 (West 1993) (Federal Question Jurisdiction).

Defendant (the "Club") is a private club in Pittsburgh, PA, serving food and beverages to members and guests and providing other services. Plaintiffs are wait staff employees of Defendant and are commonly referred

to as "Banquet Captains." They serve meals and beverages to members and guests at what are described as "private parties." Plaintiffs also perform other duties related to the provision of those services.

Plaintiffs claim violation of Sections 3(m), 6, 7, 11(c), 15(a)(2) and 16(a)(5) of the Fair Labor Standards Act (hereinafter "Act" or "FLSA"), 29 U.S.C. §201, et seq.. Plaintiffs seek monetary damages including back pay, liquidated damages, attorneys' fees and expenses. Defendant admits that it is covered by the FLSA and subject to its provisions. The Parties agree for the relevant time period (through December 1995) that Plaintiffs receive "tips" for the services they perform as defined in the Code of Federal Regulations, 29 C.F.R. §531.52. The Parties agree that Plaintiffs are "tipped employees" as defined in Section 3(t) of the FLSA, 29 U.S.C. §203(t). The practices in dispute were in effect until December 1995, when the Club changed the "tips" previously left by its members to a "service charge."

For performance of the above-referenced duties, Plaintiffs were paid hourly rates of $4.73 an hour in 1991, $4.95 an hour effective October 1, 1992, $5.04 an hour effective October 1, 1993, and $5.13 an hour effective October 1, 1994. There was a subsequent increase in Plaintiffs' hourly rates in 1995. The applicable minimum wage was $4.25 an hour during the entire period. Defendant took no credit against the hourly wage paid to Plaintiffs on account of tips received by Plaintiffs. Section 3(m) of the FLSA permits an employer to take such credit:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of

> tips by an amount determined by the employer, not by an amount in excess of (1) 45% of the applicable minimum wage during the year beginning April 1, 1990, and (2) 50% of the applicable minimum wage rate after March 31, 1991, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.
>
> 29 U.S.C. §203(m).

Plaintiffs were paid time and one-half the above stated regular rates of pay for all hours worked which were counted by Defendant, in excess of 40 hours in a work week. In addition to the cash wages paid by the Club, Plaintiffs received tips left by the members of the Club. It is because of these tips, and who ultimately kept these tips, that this action arose.

Prior to March, 1992, Defendant played no direct part in the sharing of tips received by the Plaintiffs with other members of the wait staff. There was a voluntary tip sharing arrangement among such employees except that one management employee (a Maitre D', a position comparable to an Assistant Food and Beverage Director) demanded a share of Plaintiffs' tips and received it over Plaintiffs' objections and protest.

In March, 1992, the labor organization which represented all non-management employees of Defendant acceded to the demands of the Defendant and agreed with the Defendant that three full shares of Plaintiffs' tips were to be turned over to Defendant for use at Defendant's discretion. The agreement was superseded by a new Collective Bargaining Agreement in October, 1992.

Effective January 1, 1993, Defendant took complete control of the handling and distribution of tips received by Plaintiffs for their work on Defendant's premises. Minor amounts of cash tips given directly to Plaintiffs were not included in the agreement or taken by Defendant.

Defendant used Plaintiffs' tips to pay to the wait staff, other than Plaintiffs, fixed amounts of $15.00 to serve at private parties at lunch and $50.00 to serve at private parties at dinner. Bus persons and bartenders also received fixed amounts guaranteed by the Collective Bargaining Agreement regardless of the duties performed. Defendant distributed these amounts from the tips received by Plaintiffs. After the above amounts were distributed, the remainder was divided equally among the Plaintiffs who worked on a given day and three management employees, the Food and Beverage Director and two Assistant Food and Beverage Directors. The shares allotted to the three management employees were then utilized by Defendant as follows:

> One share is designated for the Food and Beverage Director and he/she receives one-half of that share, less an amount which is used to pay part of the guaranteed salary of an Assistant Food and Beverage Director. The other one-half

> is withheld by Defendant as an incentive for the Food and Beverage Director to meet sales and production goals set by Defendant. The remaining two management shares are given in their entirety to Assistant Food and Beverage Directors. (Defendant maintains that payment of these shares is entirely at Defendant's discretion and these shares could be retained by the Defendant at its discretion.) Three management employees share in the tip pool regardless of whether they are working or not on any given day or whether they are on vacation.

The plain result of this arrangement was that the Plaintiffs did not get to keep all their tips and that three managers – even if the managers did not wait the tables and even if they were not present – were paid these tips. The *net* result was that frequently Plaintiffs did not receive the minimum wage (the net of cash wages minus the amount taken in tips).

Plaintiffs claim that tips are the property of the employee who receives them and that pursuant to the provisions of Section 3(m) of the FLSA, tipped employees must retain all tips they receive. Plaintiffs further claim that regardless of the applicability of Section 3(m), Defendant cannot take control of Plaintiff's property (tips) for its own use to the extent that the amounts taken reduce any employee's regular rate of pay during a non-overtime week in which 40 hours or fewer are worked, to less than the applicable minimum wage for every hour worked or in an overtime week, in which more than 40 hours are worked, reduces the overtime premium paid under the FLSA to less than one and one-half times the employee's regular rate of pay.

On October 14, 1994, in response to Defendant's Motion to Dismiss Paragraph 5 of Plaintiffs' Amended Complaint for Failure to State a Claim pursuant to Fed. R. Civ. P. 12(b)(6), Judge Alan Bloch of the Western District of Pennsylvania issued a Memorandum Opinion, Exhibit 1, finding that Section 3(m) of the FLSA did not apply unless the employer claims a tip credit. Judge Bloch did not decide if Defendant's taking of Plaintiffs' tips violated the minimum wage or overtime provisions of the FLSA.

Defendant then filed a Motion for Summary Judgment regarding Plaintiffs' claims of minimum wage and overtime violation resulting from Defendant's practice of taking Plaintiffs' tips for its own use. In response, Plaintiffs argued that even if Section 3(m) did not apply, Defendant was precluded from taking Plaintiffs' tips for its own use because tips are the property of the employee who receives them, and by taking employees' property (tips), Defendant was in violation of the Act to the extent that such taking resulted in Plaintiffs not receiving the minimum wage and/or overtime compensation to which they are entitled under the Act "free and clear" and "finally and unconditionally." 29 C.F.R. §531.35.

In a memorandum opinion issued on December 13, 1995, Exhibit 2, Judge Bloch held that since the "free and clear" regulation applied only to "wages," and that since tips are not wages, the free and clear regulation did not apply to tips. He also held that if the court considered both the tips and hourly wages that Plaintiffs received in applying the regulation, Plaintiffs received more than the applicable minimum wage even though Defendant participated in the tip pool. Judge Bloch further held that

because the Plaintiffs clearly received compensation in excess of the minimum wage, they are not protected by the free and clear regulation. He further found that because Defendant paid Plaintiffs their hourly rate of pay at time and one-half that rate for hours worked in excess of 40 hours in a work week, that the court's conclusion that the "free and clear" provisions of 29 C.F.R. §531.35 did not apply in this case, and Defendant's diversion of Plaintiffs' tip money is not relevant. (Exhibit 2).

A DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

While the Appellant does not have a right of review on his petition for a writ of certiorari, the Court has the discretion, under certain circumstances, to grant such a petition. Sup. Ct. R. 10 (1996); *Durham v. U.S.*, 401 U.S. 481, 91 S.Ct. 858 (1971). The reasons for the Court to grant a petition in this case are straightforward and compelling:

(1) The District Court's rulings, upheld by the Third Circuit, are directly contrary to the reasonable interpretations made by the Department of Labor regarding the applicability of Section 3(m) of the FLSA and the "free and clear" provisions of 29 C.F.R. §531.35;

(2) The rulings are directly contrary to the rulings of the Fourth and Fifth Circuits regarding Section 3(m) and to the Fifth and Sixth Circuits regarding the applicability of 29 C.F.R. §531.35 to the taking of an employee's property; and,

(3) The rulings effectively repeal the protections of the FLSA for tipped employees by allowing employers to seize any and all of an employee's tips so long as the minimum wage is paid and no tip credit is taken.

In short, the Third Circuit's position on these issues challenges well-established principles of federal law and statutory interpretation, and invites circumvention of the protection of the FLSA nationwide.

The Department of Labor has made it clear that the restrictions of Section 3(m) apply regardless of whether an employer takes a tip credit, and that the provisions of the "free and clear" regulations, 29 C.F.R. §531.35, apply to tips. A copy of these pertinent pronouncements by the Department are provided in the Appendix. Exhibit 6 is an Opinion Letter issued June 21, 1974, by the Acting Administrator. Exhibit 7 is an Opinion Letter issued November 22, 1978, by the Administrator. Exhibit 8 is an Opinion Letter issued October 26, 1989, by the Administrator.

The Court has ruled repeatedly that an Agency's interpretation of a statute over which it has explicit Congressional authority, and where Congress has not "directly spoken to the precise question at issue", are controlling so long as they are "based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 104 U.S. 2778 (1994).

The Court has also repeatedly held that the Secretary of Labor's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the

regulation. *Auer v. Robbins*, 1997 U.S. LEXIS 1272 (February 19, 1997), quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989).

A brief summary of the legislative and judicial history of the tip-related provisions of the FLSA underscores the reasonableness of the Department's interpretation of these provisions and the unreasonableness of the District Court and Third Circuit's rulings.

The issues of how tips are to be treated under the FLSA was addressed by the courts as early as 1940. The Supreme Court held that if there was not an agreement as to ownership of tips received by employees in the course of their work, the tips were the property of the employee that received them. *Williams v. Jacksonville Terminal Company*, 315 U.S. 386, 397, 62 S. Ct. 659 (1940).

Prior to 1966, the restaurant industry was exempt from the minimum wage provisions of the Act. In 1966, amendments to the Act brought the restaurant industry under its minimum wage provisions for the first time. The complete exemption of restaurant employees from the minimum wage provisions of the Act was repealed. 29 U.S.C. §213(a)(20); FLSA, P.L. 87-30, 75 Stat. 65 (1961).

The 1966 amendments added language to Section 3(m) of the Act which permitted an employer to claim a credit of up to 50% of the applicable minimum wage, for tips received by an employee.

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50% of the

> applicable minimum wage rate, except that in the case of an employee who either himself or acting through his representative, shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid to such employee by his employer shall be deemed to have been increased by such lesser amount. 29 U.S.C. §203(m), FLSA, P.L. 89-601, 80 stat. 830 (1966).

The 1966 amendments also added to the Act a definition of a "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $20.00 a month in tips." 29 U.S.C. §203(t), FLSA, P.L. 89-601, 80 Stat. 830 (1966).

The Administrator of the Wage and Hour Division of the U.S. Department of Labor, in regulations interpreting Section 3(m) of the 1966 Amendments and in administrative opinions, held to the position that the 1966 Amendments to Section 3(m) did not alter the holding in *Williams v. Jacksonville Terminal,* and that agreements between employers and employees under which tips received by the employees were turned over to the employer or were accounted to him to be treated as part of his gross receipts, were valid. 29 C.F.R. §531.55(b); 29 C.F.R. §531.59; Administrator's Opinion Letter No. 631, July 3, 1967, quoted in *Usery v. Emerson's Ltd.*, 80 Lab. Cas. (CCH) P. 33, 478 (E.D.Va. 1976).

In response to this opinion, employers in the restaurant industry adopted agreements with tipped employees under which the employees turned over to the employer

from their tips, or accounted to the employer, amounts equal to the minimum wage for each hour worked in the work week. The employer then used these amounts to guarantee the employee the minimum wage for all hours worked in the week, deducted and paid appropriate payroll taxes and paid the employee the remainder. In some instances, these agreements were reduced to writing and signed by the employees. *Usery v. Emerson's Ltd.*, supra. The courts also recognized the Administrator's interpretation of Section 3(m) which allowed this practice. *Hodgson v. Bern's Steak House, Inc.*, 20 W.H. 262 (BNA) (M.D.Fla. 1971).

Thus, the Club's tip pooling arrangement that is at issue in this case may have been permissible under Section 3(m) as it appeared in the 1966 Amendments to the Act. However, the 1974 Amendments to Section 3(m) – still in effect – changed that and made such arrangements invalid:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer but not by an amount in excess of 50% of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of

> tips among employees who customarily and regularly receive tips."

29 U.S.C. §203(m)

The District Court in this matter held that Section 3(m), as amended in 1974, does not apply when an employer does not take a tip credit as provided by Section 3(m). The District Court based its holding on the plain language of the statute. In light of the legislative history (above) of Section 3(m), the interpretations by the Administrator and the interpretations by other federal circuits, this was in error.

In the June 21, 1974, Opinion Letter, the Administrator directly addresses the meaning of the 1974 amendments to 3(m): "[The provision] is added to make clear the original congressional intent that an employer could not use the tips of the tipped employee to satisfy more than 50% of the Act's applicable minimum wage." (Exhibit 6, Opinion Letter, June 21, 1974, at 2.)

Lest there be any doubt on this point, the Administrator goes on to state:

> The amendments to Section 3(m) would have no meaning or effect unless they prohibit agreements under which tips are turned over to the employer for use by the employer in satisfying the monetary requirements of the Act. The specific language of Section 3(m) reinforces, specifically and clearly, the intent of Congress that an employee who receives $20.00 a month in tips is a tipped employee and that the employer and employee cannot agree to remove him from that category. *Id.*

The Administrator further emphasizes the point that an employee cannot waive his right to the minimum wage. *Id.*, at 3, citing *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697 (1945).

The Administrator further clarifies *who* is covered by 3(m): "It is our opinion that an employee who is subject to the Act's pay standards and who meets the statutory definitions of a tipped employee is subject to Sections 3(m) and (t)", id., and that where such an employee "has retained all tips which he receives from customers . . . he must receive *in addition* to such tips remuneration from his employees of at least 50 percent of the statutory minimum wage . . . ", *Id.*, emphasis added.

Importantly, the Administrator does not make applicability of section 3(m) depend on whether an *employer* does or does not take a credit, but on whether the *employee* is covered by relevant portions of the Act. This is the direct opposite of the District Court's approach. Moreover, the clear inference from the Administrator's statements is that tipped employees *must* retain their tips in addition to being paid at least 50% of the minimum wage.

The Acting Administrator's June 21, 1974 opinion letter has been relied upon by the Fourth and Fifth Circuits. In *Richards v. Marriott*, 549 F.2d 303, 80 Lab. CAS. (CCH) p. 33, 477 (4th Cir. 1977) cert. denied 433 U.S. 915 (1977), the court held that a tip back agreement used by the defendant in that case was invalid. The court agreed with the District Court that tips belong to the employee to whom they are left. The court did not relate that statement in any way to the condition that it applied only

when the employer claimed a tip credit. Marriott had claimed no tip credit but merely guaranteed the federal minimum wage if the employee did not make it in tips. *Id.*

As stated by the court in *Marriott*, "The 1974 Amendments were enacted on April 8, 1974, and on June 21, 1974 the Acting Administrator of the Wage and Hour Division of the United States Department of Labor issued an unpublished opinion letter in response to questions by the National Restaurant Association. This opinion letter was widely circulated in the restaurant industry. The opinion gave notice to Marriott and other employers that tips had to be retained by employees, that agreements remitting tips to employers were henceforth invalid and that the employer had to pay, regardless of the amount of tips, *at least* one-half the minimum wage." (emphasis added) *Richards v. Marriott Corp.*, at 304.

In *Marriott*, the employer underwrote the minimum wage by agreeing to pay it or make up the difference between tips received and the statutory minimum wage and claimed no tip credit under Section 3(m). The court held that tips belong to the employee to whom they are left and that after the 1974 Amendment agreements remitting tips to the employer were invalid. *Marriott* at 304.

The court characterized *Marriott*'s argument that because it claimed no tip credit it could satisfy up to 100% of its minimum wage obligation from tips as "nonsense." *Id.* at 305. The court recognized the absurdity of allowing an employer who claims no tip credit under

3(m) a 100% credit, while only allowing a 50% credit to an employer who complies with 3(m)(1) and (2).

A district court in the Fourth Circuit again, in *Usery v. Emerson's Ltd.*, adopted the position of the court in *Richards v. Marriott*, regarding "tip back" agreements. *Usery v. Emerson's Ltd.*, op cit. Similarly, the Fifth Circuit has ruled that where the employer took and did not return all tips of the employees, the practice was violative. *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464 (5th Cir. 1979), citing *Richard v. Marriott*, supra. District Courts have similarly ruled. See, e.g., *Donovan v. Tavern Talent and Placements, Inc.*, 104 Oab. Cas. (CCH) page 34, 773 (D.Colo. 1986).

In *Emerson's*, the court examined whether tip back agreements in existence prior to the effective date of the 1974 Amendments were still permissible in light of the changes in Section 3(m). The employer specifically rejected the tip credit offered by Section 3(m) as being of no benefit to it and did not want the tip credit to be applicable to it. The employer further claimed that by rendering the tip credit inapplicable to it, the employer was in the same position as it was prior to the 1974 Amendments and free to meet its entire minimum wage obligation from tips.

Emerson's had tip-back agreements with its employees under the provisions of the 1966 Amendments which were allowed under the earlier opinion of the Wage and Hour Administrator. Emerson's took the position that by not claiming a tip credit as stated above, the provisions of the 1974 Amendments that required that employees retain all of their tips did not apply, and that it

could continue its practice of meeting its entire minimum wage obligation from employees' tips. In rejecting this argument and holding that the tip back agreements were invalid, the court said that if this argument were accepted, the 1974 Amendments to Section 3(m) effectively meant nothing. *Emerson's*, op cit.

This result, which is expressly rejected by the courts in *Marriott, Emerson's* and *Barcellona,* is precisely the result which would be permitted under the District Court and Third Circuit's ruling in this case. The ruling would allow employers to eschew claiming a tip credit, pay the minimum wage and then seize their employees' tips to pay the wages to the tipped employees, to pay salaries and incentive bonuses to management – or for whatever purpose desired.

On November 22, 1978, another opinion letter was issued. Exhibit 7. Again, the Administrator emphasized, in direct reference to Section 3(m), that the tip "becomes the property of the "tipped employee" in recognition of whose service it is presented by the customer." *Id.* at 2. The Administrator also removed any doubt about whether the tip retention requirements of 3(m) are dependent upon the employer taking or not taking a tip credit:

> The tip retention requirement of Section 3(m) applies regardless of whether the employer elects to take credit for tips received. *Id.*

On October 26, 1989, the Administrator issued yet another opinion letter, WH-536, which squarely addresses the issues in this case. Exhibit 8. In Opinion Letter WH-536, the Administrator deals with the applicability of the FLSA to tip pooling arrangements if the employer

does not claim any tip credit. The question answered by the Administrator was posed by an employer who paid employees at least the minimum wage without regard to the tips they received and proposed the sharing of the tips with other employees who do not customarily and regularly receive tips.

The Administrator responded by affirming the interpretation of Section 3(m)(2) that tips are the property of the employee to whom they are given regardless of whether the employer claims no tip credit and that the wage of a tipped employee is at least the minimum wage plus all the tips he receives. The Administrator goes on to state that:

> If there is not a valid tip pool (i.e., tips are shared with non-tipped employees or are recovered by the employer under employer mandate) the employee would, in effect, contribute part of his/her property to the employer or to other persons for the benefit of the employer, with the result that the employee would not have received the full minimum wage "free and clear" as required by 29 C.F.R. §531.35. *Id.* at ___.

Importantly, the Administrator goes on to illustrate how violations would occur. These illustrations apply directly to the instant case, specifically, by showing that even if the wage actually paid by the employer exceeds the minimum wage the net wage received – after subtracting the tips taken by the employer and not returned to the employee – can be less than the minimum wage. *Id.* at 3.

Thus, contrary to the District Court's holding, it is clear under both the opinions of the Administrator of the

Wage and Hour Division and of the courts relying on those opinions, that the 1974 Amendments to Section 3(m) of the Act unequivocally bar any agreement under which an employer may appropriate the tips of a tipped employee for his own purpose, whether it be to pay the wages of the employee himself or the wages of other employees. This is the case regardless of whether the employer takes the tip credit available to him under Section 3(m). The employers in *Marriott, Emerson's Ltd., Barcellona* and *Tavern Talent* took no tip credit but used the tips of the employees to pay the wages of the employees. Those agreements were held invalid despite the fact that the employees eventually received all of their tips. In this case, the Club's practice is more egregious in that the Banquet Captains are deprived of their tips which the Club uses for its own purposes.

With regard to the "free and clear" issue, the District Court has held that although the Regulation which provides that wages must be paid "free and clear" requires that an employer may not require an employee to "kick-back" part of his wages if the "kick-back" reduces the employee's hourly wage below the minimum wage, the "free and clear" Regulation does not apply in this case because the FLSA and applicable regulation distinguish between payments that constitute "wages" and those that constitute "tips". District Court Opinion, Exhibit 2. *See* 29 C.F.R. §§531.27; 531.35; 531.60(a).

By drawing this distinction, the District Court has effectively repealed the minimum wage and overtime provisions of the Fair Labor Standards Act, not only in regard to an employer's right to take tips (property) from tipped employees for its own use but in regard to every

employee who is entitled to the protection of the Act. If an employer may seize an employee's "property" for its own use by distinguishing the "property" from "wages" paid, no employee's property or that of his family is safe from seizure. If the District Court is correct, an employer may pay an employee his wages and recover their value from property other than the wages. For example, an employer could pay proper minimum wages and overtime compensation to an employee and require, as a condition of continued employment, that the employee return to the employer an equivalent amount from any source (property) other than the employee's "wages" received from that employer. The "property" returned could be in cash from a wife's or child's earnings at another job, or in the form of other "property" such as tools, equipment or uniforms.

There is nothing to distinguish "tips" from any other "property" of an employee and the District Court gives no explanation of a distinction other than that "tips" are not "wages". Neither are uniforms or tools "wages" but the courts have consistently held, in conformance with the "free and clear" Regulation of 29 C.F.R. §531.35, that an employee cannot be required to provide uniforms or tools which are required by the employer or necessary for the performance of the employer's work. No court has made the distinction as to the source of the money with which the uniforms or tools were purchased.

For example, the district court, in *Reich v. Chez Robert, Inc.*, 821 F.Supp. 967 (D.C. N.J. 1993), *remanded on other grounds*, 28 F.3d 401 (3rd Cir. 1994), held that waiters and waitresses who were required to purchase and maintain uniforms as a requirement of employment, were entitled

to be reimbursed for the cost of purchase, replacement and maintenance of the uniforms to the extent that such cost reduced the weekly wage received by the employees below the lawful minimum wage. *Id.*, at 973. The Court did not distinguish whether these costs were expended from the cash wages received by the employees, from tips received or from any other source. The Court found the practice violative although the employer maintained that most employees owned the uniforms from other jobs previously held by them when they were employed by him. *Id.*

In a situation where waitresses were required to purchase uniforms prior to the beginning of employment, the Court found that if the purchase reduced their wages below the minimum wage in the first week of employment, the practice was violative. *Marshal v. Root's Restaurant, Inc.*, 667 F.2d 559 (6th Cir. 1981). In that case, the employees clearly did not expend "wages" paid by the employer but expended their property (cash) to buy the uniforms prior to their being employed by the employer.

In another case, the court found that where homeworker seamstresses paid for equipment to be used in their work and the purchase brought their wages below the minimum wage, the cost of the equipment was added to the back wages due to the employee. No distinction was made as to whether the equipment was bought with "wages" paid by the employer or other resources. *Martin v. Albrecht*, 802 F.Supp. 1311, 1317 (W.D. PA 1992).

Other employers have tried to make a distinction between wages paid and amounts kicked-back and the courts have held such practices to be violative of the

FLSA. A liquor store owner attempted to recover cash register shortages from employees and to distinguish the kick-backs from wages paid by an agreement with the employees that the kick-backs would not be deducted from wages but were repayments of a valid debt owed to the employer. The kick-backs were by agreement not to be used to determine whether the employee received the Federal Minimum Wage or to be considered part of the employee's basic rate of pay. The shortages were to be considered a valid debt owed to the employer by the employee "unconnected with the payroll procedures and not to be considered as payroll deductions". The Fifth Circuit held the practice to be violative of the FLSA regardless of whether it was allegedly voluntary and regardless of whether the employee paid the alleged "valid debt" out of his wages *or other resources*, when the effective rate of pay was reduced below the required minimum wage. *Mayhue's Super Liquor Stores v. Hodgson*, 464 F.2d 1196 (5th Cir. 1972) (emphasis added). The court held that the agreements were illegal to the extent that they tended to shift part of the employer's business expense to the employees and reduced their wages below the statutory minimum wage. *Mayhue*, at 1199.

It is the act of an employer shifting part of the employer's business expense to the employee that gives rise to a violation of the Act, and of the "free and clear" regulation, whether it is in cash kick-backs or the purchase of uniforms, tools or equipment. To the extent that the amount of the expense so shifted reduces the wages paid to the employee below statutory requirements, a violation results. In this case, the Club admittedly takes the property of the Banquet Captains in the form of their

tips and uses them to meet its business expenses. The question then becomes whether this shifting of expenses reduces the net cash wage below the minimum wage.

Unfortunately, in what amounted to dicta, the District Court concluded that there would be no violation even assuming applicability of the "free and clear" regulation because the Banquet Captains made some $36,000.00 per year. Exhibit 2 at 4. This is an inherently contradictory position: earlier the court had ruled tips are not wages and now it assumes they are wages for purposes of "free and clear."

Moreover, simple math shows how violations can and did occur. First it is assumed the Captains were paid about $12,000.00 annually by the Club (assuming $5.04 per hour in 1993/2,080 hours per year). Yet, in 1993 alone over $70,000.00 in tips was taken from the Banquet Captains and paid to the three managers. Exhibit 9, Excerpts of Expert Report of John O'Brien (offered in opposition to Summary Judgment), at p. 3 (see row labeled "1993 Totals"). Assuming this money was taken equally from the ten Captains, this would mean some $7,000.00 was effectively taken from the cash wages of each Captain for 1993 alone ($70,000.00 \ 10 = $7,000.00), resulting in obvious minimum wage violations ($12,000.00 wages – $7,000.00 reduction = $5,000.00 net wage, or a wage of approximately $2.50 per hour, well below the minimum wage.) Regardless, because of the District Court's erroneous ruling that, as a matter of law, tips are not covered by the "free and clear regulation," a proper analysis of whether violations occurred, and how much, must await reversal.

The clear import of the Administrator's opinions, together with the decisions of the various Courts of Appeal are:

> (1) Section 3(m) applies to tipped employees regardless of whether the employer takes a tip credit; and,
>
> (2) The "free and clear" regulation, 29 C.F.R. §531.35, applies to any property of the employee, including tips, and not merely cash wages.

The rulings of the District Court, upheld by the Third Circuit, run directly opposite. Yet, there has been no adequate analysis by either court, in accordance with *Chevron*, op cit., whether the Agency's interpretation of 3(m) is unreasonable, or any analysis whatsoever, in accordance with *Auer*, op cit., that the Administrator's interpretation of *its own regulation*, 29 C.F.R. §531.35, is "plainly erroneous." It is submitted that any such analysis, if done in accordance with this Court's earlier pronouncements, would necessarily reach the conclusion that the Administrator's interpretations, and the interpretations upheld by other Courts of Appeal, are indeed controlling.

The consequences of allowing the present rulings to stand are obvious: employers with tipped employees can and will ignore the FLSA and implementing regulations by simply not invoking the 3(m) tip credit, paying a *cash* minimum wage and seizing any and all tips, or other employee property, they can for whatever the purpose.

WHEREFORE, Petitioners request this Court grant certiorari.

Respectfully submitted,

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Dated: July 10, 1997

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

STANLEY PLATEK, LASZLO VARGA, SAM MCCULLOUGH, THOMAS HANEY, SR., MARK RIMLINGER, THOMAS VON GEIS, HARRY WRIGHT, JOHN MALEZI, FRANK TRIPODI, NICK ROMAN, and MARGARET BURTON,	)	Civil Action No. 94-901
Plaintiffs,	)	
vs.	)	
DUQUESNE CLUB, a Pennsylvania corporation,	)	
Defendant.	)	

MEMORANDUM OPINION

BLOCH, District J.

Presently before the Court is defendant's motion to dismiss the fifth paragraph of plaintiffs' amended complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). At a conference on August 8, 1994, the Court informed the parties that it would treat defendant's motion to dismiss as a motion for summary judgment and allowed plaintiffs an opportunity to present evidence in opposition to the motion. For the reasons stated in this opinion, defendant's motion will be granted in part and denied in part.

I. Background

Plaintiffs, Platek, Varga, McCullough, Haney, Sr., Rimlinger, Von Geis, Tripodi, Roman and Burton, are wait staff employees of the Duquesne Club (the Club). Plaintiff Malezi was a banquet captain employed by the Club prior to his separation from employment on June 2, 1994. With the exception of Malezi, who no longer works for the Club, and Burton, who is employed by the Club as a waitress, the remaining plaintiffs are employed by the Club as banquet captains.

The Club currently does not claim a tip credit under § 3(m) of the Fair Labor Standards Act (FLSA). Rather, pursuant to an agreement between the Club and the Duquesne Club Employees Association (Association), employees at banquet functions are paid a wage rate of at least $4.25 per hour in addition to certain set sums of gratuities. The parties agree that the gratuities in question are "tips" and that plaintiffs are "tipped employees" under the FLSA.[1] From the tips collected by the Club, a set sum of tip money is distributed to specific wait staff employees, including waiters,waitresses and bus persons, and the remaining amount is distributed evenly to the food and beverage director, assistant food and beverage director and the banquet captains.

Defendant states that all waitresses and banquet captains currently receive wages in excess of the federal

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[1] A "tipped employee" is "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." FLSA § 3(t), 29 U.S.C. § 203(t).

statutory minimum wage of $4.25 an hour. Plaintiffs Tripodi and Burton acknowledge that they currently receive hourly wage rates in excess of the minimum wage but they contend that the Club's practice of taking their tips and distributing the tip money to employees who do not customarily and regularly receive tips results in a violation of § 3(m). Plaintiff Burton, however, further states that prior to October 1, 1991, the Club paid her at the rate of $4.12 an hour to serve dinners and that it claimed a $0.13 tip credit.

The fifth paragraph of plaintiffs' complaint alleges that the Club's payment schedule constitutes willful and repeated violations of FLSA § 3(m) and § 15(a)(2).[2] Plaintiffs allege that the Club's practice of requiring wait staff employees to remit their tip monies to the Club to be shared with employees of the Club who are employed in

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[2] The paragraph reads as follows:

> *Defendant, Duquesne Club, in many workweeks, repeatedly and willfully violated the provisions of Sections 3(m), and 15(a)(2) of the Act, by unlawfully requiring Plaintiffs,* Stanley Platek, Laszlo Varga, Sam McCullough, Thomas Haney, Sr. , Mark Rimlinger, Thomas Von Geis, Harry Wright, John Malezi, Frank Tripodi, Nick Roman and Margaret Burton, who are all employees engaged in commerce or the production of goods for commerce, or employed in an enterprise engaged in commerce or the production of goods for commerce, within the meaning of the Act, *to remit their tip monies to the Duquesne Club to be shared with employees of the Duquesne Club who are employed in occupations which do not "customarily and regularly" receive tips and who are not "tipped employees" within the meaning of Section 3(t) of the Act.*

(Complaint at §5) (emphasis added).

positions that do not "customarily and regularly" receive tips violates § 3(m). Plaintiffs base their argument on administrative opinions and case law which indicate that tips are the property of the tipped employee and that there can be no valid agreement between the employer and employee that allows the employer to appropriate the tip monies for its own purposes or to distribute them to traditionally non-tipped employees.

Defendant maintains that plaintiffs' claim set forth in paragraph 5 of the complaint fails as a matter of law for two reasons. First, defendant contends that § 3(m) does not apply to the Club because it pays plaintiffs a wage rate in excess of the minimum wage rate. Second, it argues that § 3(m) does not apply to an employer unless the employer claims the tip credit.

II. Discussion

A motion for summary judgment may be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the Court must examine the facts in a light most favorable to the party opposing the motion. *Big Apple BMW, Inc. v. BMW of North America Inc.*, 974 F.2d 1358, 1363 (3d Cir.), *cert. denied*, 113 S.Ct. 1262 (1993); *International Raw Materials, Ltd.v. Stauffer Chemical Corp.*, 898 F.2d 946, 949 (3d Cir. 1990).

The issues in this case require an interpretation of FLSA § 3(m). Statutory interpretation begins with an examination of the language of the statute. *United States v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1603 (1994); *United States v. Schneider*, 14 F.3d 876, 879 (3d Cir. 1994). If the language of the statute is expressed in plain terms, then those terms are considered conclusive. *Negonsott v. Samuels*, 113 S.Ct. 1119, 1123 (1993). In ascertaining the plain meaning of the statutory language, however, the Court should avoid an interpretation that leads to an absurd result. *Anderson v. United States*, 490 F.2d 921, 928 (Ct. Cl.), *cert. denied*, 419 U.S. 827 (1974).

Section 3(m) of the FLSA, which is commonly referred to as the tip credit provision, reads as follows:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of . . . 50 percent of the applicable minimum wage rate after March 31, 1991, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. *The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.*

FLSA § 3(m), 29 U.S.C. § 203(m) (emphasis added).

The FLSA is a remedial statute designed "to correct and as rapidly as practicable to eliminate unfair labor practices." FLSA § 2, 29 U.S.C. § 202. Section 3(m) allows an employer to reduce tipped employees' wages below the statutory minimum wage by an amount to be supplemented by tips received by the employees, but only if the employer informs the employees of the tip credit provision and the employees retain possession of the tips or the tips are distributed pursuant to a valid tip pooling agreement. *Reich v. Chez Robert, Inc.* 821 F. Supp. 967, 976 (E.D.N.J. 1993), *vacated and remanded on other grounds,* 28 F.3d 401 (3d Cir. 1994).

The central issue raised by defendant's motion is whether the participation of the food and beverage director and the assistant food and beverage director in the tip pooling arrangement causes a violation of § 3(m) of the FLSA. According to plaintiffs, the tip pooling arrangement is unlawful because these "non-tipped" employees share in the tips.

The Club argues that the plain meaning of § 3(m) renders the provision inapplicable to the Club because it does not take a tip credit. According to the collective bargaining agreement between the Club and the Association, the Club currently pays its employees the full minimum wage plus a set sum in tips.

The 1974 amendments to § 3(m) were intended "to make clear the original congressional intent that an employer could not use the tips of a tipped employee to satisfy more than 50 percent of the Act's applicable minimum wage." *Richard v. Marriott Corp.*, 549 F.2d 303, 304 (4th Cir.), *cert. denied,* 433 U.S. 915 (1977).

According to a 1989 Department of Labor Wage-Hour Opinion Letter:

> Where the employer does not claim a tip credit under § 3(m) of the Act, the pooling of tips among employees would become an issue under the minimum wage provisions of the Act only if both (1) such pooling deprives a tipped employee of any amount of the tips such employee actually received *and* (2) the employer does not pay a sufficiently high cash wage to reimburse such employee for such loss, plus at least minimum wage. . . . If there is not a valid tip pool, the employee would, in effect, contribute part of his or her property to the employer or to other persons for the benefit of the employer, with the result that the employee would not have received the full minimum wage "free and clear," as required by 29 C.F.R. § 531.35.

Opinion, WH-536, 6(a) Wage & Hour Cas. (BNA) 99:1339 (Oct. 26, 1989).

Examining the language of § 3(m), the Court finds that the section plainly does not apply unless the employer seeks to claim the tip credit. Only if the employer seeks to claim the tip credit and fails to meet the conditions set forth in 3(m) does the employer violate the provisions of § 3(m). Therefore, because the employer in this case has elected not to claim the tip credit set forth in § 3(m), the Court finds that it cannot violate § 3(m) as a matter of law.[3] With regard to plaintiff Burton's claim

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[3] Whether the tip pooling arrangement challenged in this case violates the minimum wage provisions of the FLSA is not an issue that can be decided at this stage of the litigation.

alleging unlawful practices prior to October 1, 1991, the Court finds that material issues of fact preclude the entry of summary judgment at this time. With regard to the remaining plaintiffs and plaintiff Burton subsequent to October 1, 1991, however, the material facts are not disputed and summary judgment is, therefore, appropriate.

An appropriate order will be issued.

Date: 10/14/94

/s/ Alan N. Bloch
United States
District Judge

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

STANLEY PLATEK, LASZLO VARGA, SAM MCCULLOUGH, THOMAS HANEY, SR., MARK RIMLINGER, THOMAS VON GEIS, HARRY WRIGHT, JOHN MALEZI, FRANK TRIPODI, NICK ROMAN, and MARGARET BURTON,	)	Civil Action No. 94-901
Plaintiffs,	)	
vs.	)	
DUQUESNE CLUB, a Pennsylvania corporation,	)	
Defendant.	)	

ORDER

AND NOW, this 14th day of October, 1994, upon consideration of Defendant's Motion to Dismiss for Failure to State a Claim (document No. 4) filed in the above captioned matter on July 18, 1994, which this Court converted to a Motion for Summary Judgment, and upon further consideration of Plaintiffs' Response thereto, and for the reasons set forth in this Court's Memorandum Opinion filed herewith,

IT IS HEREBY ORDERED that said Motion is GRANTED in part and DENIED in part, to wit:

1. Said Motion is GRANTED, and judgment be, and hereby is entered in favor of defendant and against plaintiffs as to paragraph 5 of

the complaint as follows: in favor of defendant, Duquesne Club, and against plaintiffs Platek, Varga, McCullough, Haney, Sr., Rimlinger, Von Geis, Wright, Malezi, Tripodi, and Roman, and against plaintiff Burton to the extent plaintiff Burton alleges unlawful practices after October 1, 1991;

3. Said Motion is DENIED with respect to paragraph 5 of plaintiffs' complaint to the extent plaintiff Burton alleges unlawful practices prior to October 1, 1991.

/s/ Alan N. Bloch
United States
District Judge

cc: John R. Linkosky, Esquire
305 Mt. Lebanon Boulevard, Suite 403,
Pittsburgh, PA 15234

Stephen Olson, Esquire
1500 Oliver Building, Pittsburgh, PA 15222

EXHIBIT 2

STANLEY PLATEK, LASZLO VARGA, SAM McCULLOUGH, THOMAS HANEY, SR., MARK RIMLINGER, THOMAS VON GEIS, HARRY WRIGHT, JOHN MALEZI, FRANK TRIPODI, and NICK ROMAN, Plaintiffs,

vs.

DUQUESNE CLUB, a Pennsylvania corporation, Defendant.

Civil Action No. 94-901

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

961 F. Supp. 835; 1995 WL 795659 (W.D. Pa.)

Dec. 13, 1995.

John R. Linkosky, Pittsburgh, PA, for plaintiffs.

Stephen M. Olson, Michael A. Pavlick, Robert L. Byer, Kirkpatrick & Lockhart, Pittsburgh, PA, for defendant.

MEMORANDUM OPINION

BLOCH, District J.

*1 Presently before this Court is defendant Duquesne Club's (Club) motion for summary judgment with regard to various claims asserted by plaintiffs. For the reasons stated in this opinion, the Court will grant the Club's motion in part and will deny it in part.

I. Background

This action stems from the Club's alleged failure to pay plaintiffs minimum wages and proper overtime compensation and to keep proper payroll records as required by the Fair Labor Standards Act (FLSA), 29 U.S.C. §201, et seq.. Briefly stated, the undisputed facts are as follows.

The Club is a private social organization located in Pittsburgh, Pennsylvania. The Club provides a variety of services to its members and guests of its members. In particular, Club members have the privilege of reserving private suites or banquet rooms at the Club's premises for private dining functions. These "private parties" range from two-person dinners to wedding receptions, and they typically occur at lunch or dinner time. The Club also provides catering services for its members at other locations, including its members' homes and business offices. The Club's food and beverage director and two assistant food and beverage directors[1] are responsible for organizing and overseeing these functions.

Plaintiffs are employees of the Club who hold the position of "banquet captain."[2] Banquet captains function as head waiters at the Club's private parties and at the parties that the Club caters off-premises. Their job responsibilities include setting up dining tables and bars, transporting supplies, supervising wait staff, bartending, and waiting on tables.

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[1] The food and beverage directors were formerly referred to as the Club's maitre d's.

[2] Plaintiff John Malezi was employed as a banquet captain prior to his separation from employment on June 2, 1994.

Since their employment at the Club, the plaintiffs have been members of the Duquesne Club Employees Association Union (Union).[3] Over the years, the Union and the Club have negotiated a series of collective bargaining agreements, including an agreement which has been in effect since October 1, 1992. Pursuant to this contract, plaintiffs are paid an hourly wage of $5.37 – $1.12 in excess of the current minimum wage of $4.25.

In addition to their hourly wages, plaintiffs receive tips from Club members and guests. In 1993, plaintiffs' average total earnings (i.e., wages and tips combined) before taxes were approximately $37,000; in 1992, the average figure was approximately $36,000; and in 1991, the average figure was approximately $35,700. (*See* defendant's Exhibit 22). Plaintiffs also receive various benefits from the Club, including life and health insurance.

The dispute currently before the Court centers around the Club's past and present "tip pooling" arrangements – arrangements under which tips collected at private parties are combined and divided among various Club employees. The mechanics of the tip pooling practices of the Club have varied over time. From June, 1991 to March, 1992, the banquet captains collected and distributed the tips among wait staff, including themselves, who worked a private party. Three management employees also shared in the tip pool. Although the banquet captains were allegedly displeased with the management employees' participation in their tip pool, they

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[3] The Union has recently become affiliated with the Communications Workers of America Union.

allegedly included them because of one manager's threats and intimidating actions.

*2 Subsequently, in March, 1992, the Club and the Union entered into an amendment to the parties' collective bargaining agreement that slightly changed the prior tip pooling practices. Under the amendment, the parties agreed that the Club itself would take control over the three shares of the tip pool formerly given to the management employees, and in turn would distribute these shares to its managers as incentive compensation in its discretion.

Ultimately, as part of further negotiations between the Union and the Club, the Club took even greater control over the tip money received by its employees. A provision of a new collective bargaining agreement effective January 1, 1993, formalized the earlier March amendment insofar as it provided that three management employees will participate in the Club's tip pool; in actuality, the Club retains control over these three shares. In addition, the contract provides that the Club, instead of the banquet captains, will handle the accounting and distribution of all tip money.[4]

Partially as a result of the Club's increased role and participation in the tip pool, the plaintiffs initiated the instant litigation. The complaint alleges that the tip pooling practices previously described violate the minimum

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[4] The collective bargaining agreement made other major changes to the prior tip pooling practices, including the manner in which tips are paid to regular wait staff employees and bartenders, but these changes are not relevant for purposes of the Court's analysis.

wage and overtime compensation provisions of the FLSA, *see* 29 U.S.C. §§206 and 207, and that the Club violated the FLSA by failing to properly keep wage and hour records, *see* 29 U.S.C. §211. The Club has filed a motion for judgment in its favor with regard to these claims.

The plaintiffs have also alleged that the Club violated the FLSA by failing to use the plaintiffs' compensation obtained at catered parties held off of the Club's premises when computing the plaintiffs' overtime compensation and that the plaintiffs were not compensated for various work that they performed before and after their shifts. The Club admits that issues of material fact remain with regard to these claims and, therefore, it does not seek summary judgment thereon.

II. Discussion

Fed. R. Civ. P. 56(c) provides that judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In addition, Fed. R. Civ. P. 56(e) provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if

> appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

When deciding a motion for summary judgment, the threshold inquiry is whether the movant has met its initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Northern Insurance Co. v. Aardvark Associates*, 942 F.2d 189, 194 (3d Cir. 1991). The evidence must be viewed in the light most favorable to the non-moving party. *O'Donnell v. United States*, 891 F.2d 1079, 1081-82 (3d Cir. 1989). Once the initial burden has been met, the moving party will prevail if the evidence would support judgment as a matter of law in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *National State Bank v. Federal Reserve Bank of New York*, 979 F.2d 1579, 1581 (3d Cir. 1992).

*3 The issues in this case require an interpretation of the FLSA. The FLSA is a remedial statute that Congress enacted to guarantee certain minimum labor standards. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). More specifically, the FLSA "was designed to place a floor under wages and a ceiling over hours of employment," *Marshall v. Western Union Telegraph Co.*, 621 F.2d 1246, 1250 (3d Cir. 1980), in order to alleviate labor conditions that are " 'detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency and general well-being of workers.' " *Lyon v. Whisman*, 45 F.3d 758, 763 (3d Cir. 1995) (quoting 29 C.F.R. §202). "The substantive sections of the FLSA, narrowly

focused on minimum wage rates and maximum working hours, bear out its . . . purposes." *Id.* at 764.

A. Plaintiffs' claims under §6 of the FLSA

The Club initially moves for judgment in its favor with regard to plaintiffs' claims under §6 of the FLSA. Section 6, the minimum wage provision, provides in pertinent part that:

> Every employer shall pay to each of his employees who in any work week is engaged in commerce or in the production of goods in commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages [of] not less than $4.25 an hour. . . .

29 U.S.C. §206(a)(1). The parties do not dispute that the plaintiffs are employees covered by this section.

Regulations implementing this minimum wage provision further provide that an employer must pay its employees a minimum wage "free and clear." 29 C.F.R. §531.35. In other words, the minimum wage must be paid "finally and unconditionally." *Id.* The "free and clear" regulation specifically provides that:

> The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee provide tools of the trade which will be used in or are

> specifically required for the performance of the employer's particular work, there would be a violation of the Act in any work week when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act.

Id. In sum, minimum wages must be paid to the employee without any requirement that the employee return such wages to the employer. *Id.*; *see generally Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1197 (5th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973).

Plaintiffs contend that the Club's practice of taking and retaining control over three shares of the tip pool violates the free and clear regulation described above and, therefore, violates §6 of the FLSA. Plaintiffs first note that under applicable law, absent a valid agreement to the contrary, tips are owned by and are the property of the employees who receive them. *See, e.g., Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 403-04 (1942). By requiring plaintiffs to turn over a portion of their tips to their employer, plaintiffs contend that the Club has violated the free and clear regulation insofar as plaintiffs are required to "kick-back" a portion of their property (*i.e.*, their tips) for the employer's benefit. Plaintiffs conclude that a minimum wage violation has occurred in this case because when one subtracts the portion of their tips that were retained by the Club from their hourly wages, their hourly wages are reduced to below the applicable minimum standard.

*4 Plaintiffs' argument is unpersuasive, however. First, although the free and clear regulation implementing §6 provides that an employer may not require an

employee to "kick-back" a part of his wages if the kick-back reduces the employee's hourly wage to below the federal minimum, this "free and clear regulation" is not applicable in this case. The FLSA and the applicable regulations clearly distinguish between payments that constitute "wages" and payments that constitute "tips." *See* 29 U.S.C. §203(m); 29 C.F.R. §§531.27(c); 531.60(a). Because the plain language of the free and clear regulation only prevents the kick-back of wages, the prohibition simply does not apply to tips. The fact that no case law exists which has specifically applied the free and clear analysis to the kick-back of tips lends support to the Court's analysis.

Furthermore, even if tips were considered "wages" for purposes of the free and clear regulation, the evidence does not demonstrate that a violation of this regulation has occurred in this case. The free and clear regulation is only breached if a "kick-back" to an employer reduces the employee's hourly wage to below the minimum standard. Here, however, if the Court considers both the tips and hourly wages that the plaintiffs received for purposes of applying the regulation, it is clear that the plaintiffs have received more than minimum wage – even though the Club has participated in the tip pool. In fact, the plaintiffs' average compensation over the past three years was approximately $36,000, far in excess of the minimum standard.

Plaintiffs' argument that the Court should only consider the tips "kicked-back" to the employer – and not the tips actually received by the plaintiffs – when determining whether the Club's actions reduces the plaintiffs'

hourly wage below the applicable minimum is not supported by the purpose of the regulations. In particular, the purpose of the minimum wage provision of the FLSA is to ensure that employees can maintain a minimum standard of living. *See, e.g. Lyon*, 45 F.3d at 763-64. Plaintiffs clearly receive compensation in excess of the minimum standard and are, therefore, not the type of employee that the free and clear regulation was intended to protect.

Although at first glance, allowing an employer to participate in a tip pool may appear to be inequitable and detrimental to an employee's maintenance of minimum labor standards, other provisions of the FLSA exist to ensure that a tipped employee actually receives the minimum wage. For instance, §3(m), which allows an employer to take a "tip credit" and pay tipped employees only fifty percent of the applicable minimum wage, provides that an employer may not participate in a tip pool or otherwise take control over tips if the employer is claiming a tip credit. The reasoning behind §3(m) is clear: if an employer is allowed to avoid its minimum wage obligation because its employees receive compensation in the form of tips, the employer should not be permitted to share in these tips because such sharing could result in the employee's receipt of less than the minimum wage. The situation before the Court is inapposite to the situation at issue under §3(m),[5] however, because the Club

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[5] See this Court's Memorandum Opinion entered October 14, 1994, in which the Court granted the Club's motion to dismiss plaintiffs' claims under §3(m).

does not claim a tip credit. Rather, the Club pays plaintiffs in excess of the minimum wage and, therefore, even if the plaintiffs and the Club had agreed that the Club could retain all of the plaintiffs' tips, the plaintiffs would still receive compensation in excess of the minimum standard – which is all that §6 and the free and clear regulation require.

*5 Finally, the Court notes that plaintiffs' entire argument with regard to the free and clear regulation is premised on the assumption that tips are the property of the employee. However, as plaintiffs themselves have recognized, tips are only the property of an employee absent an agreement to the contrary. Although the Court will not dwell on this issue, the plaintiffs' Union entered into contracts on the plaintiffs' behalf which specifically agreed to the Club or the Club's managers taking control over three shares of the tip pool. Therefore, plaintiffs' assumption that all of their tips are their property is itself subject to question.[6]

The plaintiffs have also argued that the Club's tip pooling arrangement violates §6 based upon a Department of Labor wage and hour opinion letter dated October 26, 1989, which indicates that tip pooling arrangements can violate the minimum wage provisions of the FLSA if (1) such pooling deprives a tipped

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[6] Plaintiffs attempt to avoid the collective bargaining agreement by noting that they cannot waive their rights under the FLSA. While neither the Union nor the plaintiffs themselves could have agreed to the plaintiffs' receipt of less than the minimum wage, however, the plaintiffs can agree to give away their tips so long as they still receive the minimum wage.

employee of any amount of the tips that the employee actually received, and (2) the employer does not pay a sufficiently high cash wage to reimburse such employee for the loss, plus at least the minimum wage. (*See* plaintiffs' Exhibit H).

Although this opinion letter does indicate that the Club's tip pooling arrangements could constitute a violation of §6, the opinion letter is not binding precedent upon this Court. *See* 29 C.F.R. §531.25 ("The ultimate decisions on interpretations of the Act are [to be] made by the courts."). Further, although agency interpretations are entitled to deference, *see Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, (1984), such deference is not appropriate where the agency's interpretation is not supported by the plain language and/or purpose of the statute or regulation at issue. *See, e.g., Director, Office of Workers' Compensation Programs v. Barnes and Tucker Co.*, 969 F.2d 1524, 1527 (3d Cir. 1992); *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 837 F.2d 600, 609 n. 6 (3d Cir. 1988).

In this case, the Court finds that to the extent that the agency's opinion letter indicates that tip pooling arrangements can violate §6, the interpretation is contrary to the language and purpose of the applicable regulation and, for the reasons previously discussed, the opinion letter will not be followed by this Court.[7]

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[7] Although this Court's memorandum opinion issued on October 14, 1994, did not preclude the possibility that the Court would apply the opinion letter in this case, the issue with regard to §6 was not before the Court and any statement regarding §6 and the opinion letter in the Court's Memorandum Opinion was purely dicta.

For all of the reasons previously discussed, the Court will grant the Club's motion for summary judgment with regard to the plaintiffs' claims under §6 that stem from the Club's tip pooling practices.

B. Plaintiffs' claims under §7 of the FLSA that relate to tip pooling

The Club has also moved for summary judgment with regard to plaintiffs' §7 claims under the FLSA that are based upon the tip pooling practices previously discussed.[8]

Section 7(a)(1) of the FLSA requires employers to pay non-exempt employees who have worked in excess of forty hours per week overtime compensation equivalent to one and one-half times the employees' regular hourly rate of pay. 29 U.S.C. §207(a)(1); *Marshall*, 621 F.2d at 1248. "Overtime pay, as required by the FLSA, has not been paid unless both straight time pay and overtime pay have been fully paid and have been paid based on an employee's regular pay." *Reich v. Midwest Body Corp.*, 843 F. Supp. 1249, 1252 (ND. Ill. 1994); *see also* 29 C.F.R. §778.315. In other words, proper overtime compensation

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[8] Although the Club's motion for summary judgment does not specifically address this claim, the Club raised this matter after plaintiffs made their position clear with respect to this claim in their brief in opposition to the defendant's motion for summary judgment. (See defendant's reply brief at pp. 6-8). After the Club's reply brief was filed, the parties have each filed two supplemental memorandums addressing their respective positions in this regard. Therefore, the Court may address this matter at this time.

cannot be deemed paid unless and until the employee has been compensated at the regular rate of pay for the first forty hours worked. (*See* defendant's supplemental memorandum of law at p. 9; plaintiffs' reply brief at p. 25).

*6 Here, plaintiffs argue that the Club did not pay them the correct overtime compensation with regard to their work at private parties because the plaintiffs never actually received their contractually-guaranteed regular rate of pay (currently $ 5.37 per hour). More specifically, plaintiffs once again rely on the free and clear regulation previously discussed and contend that they did not receive their "regular pay" because they were forced to "kick-back" their property (i.e., their tips) to their employer, and this kick-back had the effect of reducing their hourly wages to below their regular rate of pay.

Again, the Court is unpersuaded by the plaintiffs' free and clear analysis. The plaintiffs' overtime claims, like their minimum wage claims, are predicated on an assumption that the free and clear regulation previously discussed is applicable in this case. However, for the reasons set forth above, the diversion of tip money is simply not relevant in determining whether plaintiffs have received all of their "straight time" pay. Thus, because the Club has actually paid plaintiffs their contractually-agreed upon wage rate for their first forty hours of work, and one and one-half times that wage rate for hours worked in excess of forty, the plaintiffs' overtime compensation claim must fail.[9] Therefore, the Court

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[9] The Court notes that issues currently exist with regard (1) to whether the plaintiffs' performed work before and after their

finds that the Club's tip pooling practices do not amount to a violation of §7 of the FLSA, and the Court will grant the Club's motion for summary judgment with regard to this claim.

C. Plaintiffs' claim under §11 of the FLSA

Finally, the Club has moved for summary judgment with regard to plaintiffs' claim under §11 of the FLSA. That section requires that "every employer . . . shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." 29 U.S.C. §11(c). "An employer's failure to keep records in accordance with §11(c) is unlawful under the Act." *Reich v. Chez Robert, Inc.*, 821 F. Supp. 967, 975 (D.N.J.), *vacated on other grounds*, 28 F.3d 401 (3d Cir. 1993).

The Club argues that it is entitled to summary judgment on plaintiffs' claim under §11 because plaintiffs' pretrial statement fails to specifically make mention of such a claim. Plaintiffs' pretrial statement does, however, refer to the FLSA's §11 requirements. (*See* plaintiffs' pretrial statement at p. 13). Further, the Club's motion itself indicates that the Club is aware of the plaintiffs' claim in

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shifts for which they were not compensated and (2) to whether the Club failed to properly pay plaintiffs' overtime compensation with regard to their work at catered parties away from the Club's premises. The Court's statement is not meant to reflect on these issues.

this regard. Accordingly, the Court finds that the plaintiffs' lack of a clearer explanation in their pretrial statement regarding their §11 claim is not sufficient grounds for this Court to enter judgment in the Club's favor and, therefore, the Club's motion for summary judgment on this claim will be denied.

An appropriate Order will be issued.

ORDER

AND NOW, this 13th day of December, 1995, upon consideration Defendant's Motion for Summary Judgment (document No. 30) filed in the above captioned matter on March 10, 1995, and upon further consideration of Defendant's Briefs in Support thereof and Plaintiffs' Responses in Opposition thereto, and for the reasons set forth in this Court's Memorandum Opinion filed herewith,

*7 IT IS HEREBY ORDERED that said Motion is GRANTED in part and DENIED in part, to wit:

1. Said Motion is GRANTED to the extent that judgment be, and hereby is, entered in favor of defendant and against plaintiffs with regard to plaintiffs' claims under §6 of the FLSA that stem from the Club's tip pooling practices;

2. Said Motion is GRANTED to the extent that judgment be, and hereby is, entered in favor of defendant and against plaintiffs with regard to plaintiffs' claims under §7 of the FLSA that stem from the Club's tip pooling practices; and

3. Said Motion is DENIED to the extent that defendant seeks judgment in its favor on plaintiffs' claim under §11 of the FLSA.

EXHIBIT 3

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

STANLEY PLATEK, et al.

Plaintiffs,

vs.

DUQUESNE CLUB,

Defendant.

CIVIL ACTION
No. 94-901

Judge Bloch

ORDER

AND NOW, this 9th day of April, 1996, upon agreement of the parties, all remaining claims in this action are dismissed with prejudice.

_____

United States district Judge

EXHIBIT 4

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3255

STANLEY PLATEK; LASZLO VARGA;
SAM MCCULLOUGH; THOMAS HANEY, SR.;
MARK RIMLINGER; THOMAS VON GEIS;
HARRY WRIGHT; JOHN MALEZI; FRANK TRIPODI;
NICK ROMAN; MARGARET BURTON,

v.

DUQUESNE CLUB, A PENNSYLVANIA CORPORATION

STANLEY PLATEK; LASZLO VARGA; SAM MCCULLOUGH; THOMAS HANEY, SR.; MARK RIMLINGER; THOMAS VON GEIS; HARRY WRIGHT; JOHN MALEZI; FRANK TRIPODI; NICK ROMAN,

Appellants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 94-cv-00901)
District Judge: Honorable Alan N. Bloch

Argued January 15, 1997

Before: SLOVITER, Chief Judge, SCIRICA and SEITZ, Circuit Judges

JUDGMENT ORDER

The appellants, except Margaret Burton, having

appealed from a final judgment of the district court dated April 9, 1996, in favor of appellee, Duquesne Club, and this court having concluded that the summary judgment granted by the district court should be affirmed essentially for the pertinent reasons given in the district court's Memorandum opinion dated October 14, 1994, and in its Memorandum Opinion dated December 13, 1995, it is

ADJUDGED AND ORDERED that the judgment of the district court entered on April 9, 1996, be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT:

/s/ Seitz
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: FEB 5, 1997

Certified as a true copy and issued in lieu of a formal mandate on April 21, 1997.

Teste: /s/ Herbert

Chief Deputy Clerk,
U.S. Court of Appeals for the Third Circuit

EXHIBIT 5

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3255

STANLEY PLATEK, LASZLO VARGA,
SAM McCULLOUGH, THOMAS HANEY, SR.,
MARK RIMLINGER, THOMAS VON GEIS,
HARRY WRIGHT, JOHN MALEZI, FRANK TRIPODI,
NICK ROMAN, MARGARET BURTON

v.

DUQUESNE CLUB, A PENNSYLVANIA CORPORATION

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and SEITZ,* Circuit Judges

The petition for rehearing filed by Appellants Stanley Platek, Laszlo Varga, Sam McCullough, Thomas Haney, Sr., Mark Rimlinger, Thomas Von Geis, Harry Wright, John Malezi, Frank Tripodi and Nick Roman in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

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* Senior Circuit Judge Collins J. Seitz, as to panel rehearing only.

By the Court,

/s/ Sloviter
Chief Judge

Dated: APR 11, 1997

EXHIBIT 6

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Washington, D.C. 20210

21 JUN 1974

This is in reply to your letters of April 3 and April 10, 1974, requesting an opinion on a proposed pay plan for waiters and waitresses who are in employment which is subject to the pay standards of the Fair Labor Standards Act.

Under the proposed pay plan, the employer would retain all monies generated by tips as reflected on credit charge records. This would be done pursuant to a written and signed agreement between the employer and each of the employees. Each waiter or waitress would be paid at the applicable minimum wage for each and every hour worked in any given workweek. If overtime is worked it would be paid in keeping with the requirements of the law.

Your April 10th letter asks, in addition, as to the propriety of an employer taking all tips, to be turned over by the waiter on a daily or weekly basis, and using such tips to pay the waiters at a rate of compensation that would be equal to the amount of the tips received by them, less the statutory deductions. Should any waiter exceed the overtime standard by working in excess of 48 hours per week, the employer would pay the overtime by taking the gross tips earned by him in a week, divide the gross tips by the number of hours worked and add one-half of this hourly rate to those hours worked in excess of 48.

Section 3(m) of the Act as amended in 1974 contains the following provisions defining the wages of tipped employees:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount to be determined by the employer, but not by an amount in excess of 50 percent of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Section 3(t) of the Act contains the following definition:

> "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips.

It is our opinion that an employee who is subject to the Act's pay standards and who meets the statutory definition of a tipped employee is subject to the above cited provisions of sections 3(m) and (t) in determining the bare legal minimum wage which he is entitled to receive from his employer. In other words, where such an employee has retained all tips which he receives from customers, whether in cash or through credit card

charges, he must receive in addition to such tips remuneration from his employer of at least 50 percent of the statutory minimum wage for each hour worked in the workweek. Payment of more than 50 percent of the applicable minimum wage will be required when the tips received and the maximum tip credit of 50 percent fail to yield the full minimum wage.

Since the provisions concerning "tipped employees" were adopted in full from the Senate Bill, S. 2747, we must be guided by the clarification of these provisions which is found on pages 42 and 43 of Senate Report No. 93-690, As stated on page 43 of the report, the provision requiring retention of all tips by the employee "is added to make clear the original Congressional intent that an employer could not use the tips of a "tipped employee" to satisfy more than 50 percent of the Act's applicable minimum wage." The amendments to section 3(m) of the Act would have no meaning or effect unless they prohibit agreements under which tips are credited or turned over to the employer for use by the employer in satisfying the monetary requirements of the Act. The specific language added to section 3(m) reinforces, specifically and clearly, the intent of Congress that an employee who receives $20 a month in tips is a tipped employee, and that the employer and employee cannot agree to remove him from that category.

Under the amended Act, a tip becomes the property of the "tipped employee" in recognition of whose service it is presented by the customer. The tip is given to the employee, not the employer. Thus, where an employer acquires the tips of a tipped employee in contravention of section 3(m) and uses such tips to pay the employee, the

employee has in effect waived his rights to the minimum wage. However, an employee, including a tipped employee, cannot waive his rights to be paid the applicable statutory minimum wage or required overtime compensation. See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697. Moreover, no part of any tip repayments may be counted towards satisfaction of the statutory minimum since the employee has been paid nothing by the employer. It cannot be said that an employee has been paid by his employer when the money used is the employee's own money.

Where the employee is a tipped employee under the definition in section 3(t) but the terms of either section 3(m)(1) or (2) are not fully met, such an employee is excluded from the application of the tip credit provision and, therefore, must receive payment from the employer of not less than the full statutory minimum wage. Proper payment to the employee where this has been the case would require the return to the employee of the tips which have been given to the employer plus payment of the full statutory minimum wage (and overtime pay where applicable) for all hours worked in the workweek.

Sincerely,

Signed

Warren D. Landis
Acting Administrator
Wage and Hour Division

EXHIBIT 7

NOV 22 1978

This is in reply to your letter dated August 29, 1978, requesting an opinion pursuant to Section 10 of the Portal to Portal Act of 1947 (29 U.S.C. Section 259).

You ask us to consider a company that operates a concession (e.g., parking, hat check, etc.) in an establishment such as a hotel or restaurant. In some cases, the establishment pays the concessionaire a monthly fee, which is like a subsidy in that it does not cover all of the concessionaire's expenses. In other cases, there is no fee. In still other cases, the concessionaire must pay the establishment a monthly rental for the concession. The concessionaire's customers are not charged any fee for the services of the concession. The employees of the concessionaire receive tips from such customers, however, and these are immediately turned over by the employee to the concessionaire.

Therefore, the concencessionaire's operating income may be limited to the turned over tips only or it may be a combination of tips and the above referenced monthly fee (subsidy). In either case the employee's wages are paid from these sources, and the total payment from these sources equals or exceeds the minimum wage required by the Fair Labor Standards Act. The employer does not avail himself of a tip credit.

You ask whether under the above circumstances the concessionaire's handling of tips complies with the requirements of the Fair Labor Standards Act. You indicate your

familiarity with Wage Hour Administrator Opinion Letters Nos. 1362 (2-18-75) and 1375 (4-30-75) which discuss tips. It is your belief that these opinion letters do not apply in the situation you have presented for our consideration because the concessionaire is providing a free service to its cutomers and the concessionaire's only, or primary, source of income is the tips given to the concessionaire's employees by its customers.

We disagree with your conclusion that the manner of handling tips as described above complies with the Fair Labor Standards Act. As you are aware, the tip credit provisions of section 3(m) of the Act, as amended in 1974, state:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount to be determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee. (The 50 percent limitation is reduced to 45 percent effective January 1, 1979, and to 40 percent effective January 1, 1980.

Thus, under the amended Act, a tip becomes the property of the "tipped employee" in recognition of whose service it is presented by the customer. The tip is given to the

employee, not the employer. Where an employer acquires the tips of a tipped employee in contravention of section 3(m) and uses such tips to pay the employee, the employee has in effect waived his rights to the minimum wage. However, an employee, including a tipped employee, cannot waive his rights to be paid the applicable statutory minimum wage or required overtime compensation. See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697.

It is our position that where an employer acquires the tips of a "tipped employee" in contravention of section 3(m) the employer is required to restore the full amount of the tips thus acquired. Such employer may, however, claim the tip credit, after such tips are fully restored, for up to 50% of the minimum wage, provided the tips actually received equal or exceed the value of the tip credit claimed by the employer. The tip retention requirement of section 3(m) applies regardless of whether the empoyer elects to take credit for the tips received.

You indicate the State's labor code prohibits an employer from collecting tips received by its employees or crediting them toward wages, except where "no charge is made to a patron for services rendered to the patron by an employee on behalf of his employer if both of the following conditions are met: (a) the employee is receiving a wage or salary not less than the higher of the state or Federal minimum wage, regardless of whether such employee to subject to either such minimum wage law, and (b) the employee's wage or salary is guaranteed and paid in full irrespective of the amount of tips received by the employee." It is apparent from the foregoing that the tip provisions of the FLSA are more protective of

employee rights, and they therefore govern, regardless of the provisions of the State's labor code.

We regret that an earlier response to your letter was not possible.

Sincerely

/s/ Herbert
Acting Deputy Administrator
Wage and Hour Division

Xavier M. Vela
Administrator

Enclosure

EXHIBIT 8

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

OCT 26 1989

Dear Mr.

This is in response to your letter concerning application of the Fair Labor Standards Act (FLSA or the Act) to employees of a casino in Las Vegas, Nevada. The issues you have raised are very fact dependent and we have been unable to obtain a complete picture of the facts, especially concerning industry practices. Therefore, we are unable to give a definitive response to all of the issues. However, we are able to provide some guidance which we hope will be of assistance to you.

You seek our opinion on an employment practice by which dealers would be required to pool 15% of their tips with "boxmen" and "floormen," and in addition would be required to pool all remaining tips into one common fund all of which would then be returned to the dealers, apparently on an average basis. The casino would not claim a tip credit under section 3(m) of the Act for any employee.

You point out that the casino would keep accurate records of all tips received by each employee and would effect necessary tax withholdings and filing of reports with the Internal Revenue Service (IRS). (We assume that the amount of tip income, which would be reported to

IRS with regard to the dealers would be the amount they actually received after the pooling process, and not the amount such person received from the customers in the first instance.) One of the stated purposes of the proposed 15% pool with boxmen and floormen is to "prevent the anomaly . . . of dealers receiving a higher income than boxmen and floormen, and hence having to take a decrease in compensation if and when promoted to boxmen or floormen".

You have raised three specific questions going to the legality under FLSA of the proposed tip-pooling arrangement, as follows:

> First, does FLSA have any applicability at all to employer-imposed tip-pooling arrangements if the employer does not claim any tip credit (i.e., itself retains no part of the tips and itself pays each and every one of its employees at least the minimum wage, without regard to tips received by the employees)?
>
> Second, if FLSA does, in fact, prohibit employer-imposed tip-pooling arrangements except with respect to employees who "customarily and regularly" receive tips, even where the employer itself retains no part of the tips and pays the minimum wage (and no tip credit is claimed), are "boxmen" and "floormen" employees who "customarily and regularly receive tips" within the meaning of the Act, so that our client's proposed tippooling arrangement can be implemented without the consent of the dealers?
>
> Third, if FLSA does, in fact, prohibit employer-imposed pooling arrangements under which 15% of the tips are distributed to boxmen and floormen, would it be a violation of the FLSA

> for our client to hire . . . only those dealers who are willing to sign an agreement authorizing the proposed pooling and distribution arrangement?

In responding to these questions, we do not question herein the legality of an arrangement under which the tip pooling is entirely voluntary and under the control of the employees, in which the employer plays no role in the distribution of the tips or otherwise.

Turning to the first question, you take the position that FLSA does not proscribe or regulate tip-pooling arrangements *per se*, but rather, questions under the FLSA regarding the legality of a given tip pool situation would arise only in connection with an employer's claiming of a tip credit pursuant to section 3(m). In your discussion, you primarily focus upon tip-pool arrangements among employees who do not customarily and regularly receive tips, which in the context of the instant case apparently refers to the boxmen and floormen.

Where the employer does not claim a tip credit under section 3(m) of the Act, the pooling of tips among employees would become an issue under the minimum wage provisions of the Act only if both (1) such pooling deprives a tipped employee of any amount of the tips such employee actually received *and* (2) the employer does not pay a sufficiently high cash wage to reimburse such employee for such loss, plus at least the minimum wage of $3.35 per hour. The courts have made clear that tips are the property of the employee to whom they are given. See *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 466-467 (5th Cir. 1979). In this circumstance, therefore, if there is not a valid tip pool, the employee would,

in effect, contribute part of his or her property to the employer or to other persons for the benefit of the employer, with the result that the employee would not have received the full minimum wage "free and clear," as required by section 531.35 of Regulations 29 CFR Part 531. In *Donovan v. Tavern Talent and Placements, Inc.*, 104 LC § 34, 773 (D. Colo. 1986), the court discussed the effect of the 1974 FLSA amendments, and expressly held that a "tip-back" arrangement is unlawful under section 3(m) of FLSA. The essence of the court's decision is that an employer is not permitted to use tips of its employees to defray its minimum wage obligations.

The following examples demonstrate the application of these principles in two cases. In the first, the arrangement would not violate the minimum wage provisions of the Act. In the second, the arrangement could violate the Act's minimum wage provisions. For purposes of both examples, assume that the hypothetical employee is paid a $5.00 hourly wage and averages $10.00 per hour in tips. (The closer an employee's wage rate is to the statutory minimum, of course, the greater the chance that diversion of a portion of his or her tips will raise compliance questions under the minimum wage provisions of the Act.)

(1) The employer diverts $1.00 of the employee's tips to other employees. There would be no minimum wage violation since the net amount received by the employee ($9.00 tips plus $5.00 wage = $14.00) is in excess of the total amount of tips plus $3.35 ($13.35).

(2) The amount of the diversion is $3.00 instead of $1.00 per hour. Here there could be a minimum wage violation of $1.35 per hour since the net amount

received by the employee ($7.00 tips plus $5.00 wages = $12.00) is less than the total amount of tips plus $3.35.

Where the second situation arises, therefore, it would be necessary to determine whether the diversion of tips is proper for purposes of the Fair Labor Standards Act. Although section 3(m) concerns the circumstances in which a tip credit can be taken, it also provides guidance on the circumstances in which a requirement that employees contribute a portion of their tips to other employees would be an improper deduction from wages for purposes of compliance with section 6 of the Act. In section 3(m) Congress recognized the practice of the pooling of tips "among employees who customarily and regularly receive tips." It therefore follows that employees who participate in a valid tip pool would not be considered to have rebated the pooled tips originally received by them, for purposes of compliance with section 6(a) of FLSA.

On the other hand, where tips are redistributed to employees who do not customarily and regularly receive tips (discussed below), an employee who has originally received tips will be considered to have contributed all such improperly redistributed tips to the employer for purposes of determining whether he or she has received the minimum wage, free and clear.

Furthermore, where the tip pool is otherwise valid, the Department will not consider its voluntary or involuntary nature (see section 531.54 of the Regulations) where at least 85% of tips originally received by each employee are redistributed to such employee, so that the employee's net contribution to the pool does not exceed 15% of the

tips the employee originally received.[1] This enforcement principle is set out in the Wage-Hour Field Operations Handbook at section 30d04(b). In the context of the casino industry, where an employee might receive an unusually high tip from a patron who had particularly good fortune on a given night, receipt of such a high tip could result in a minimum wage violation where the tips of all tipped employees are pooled and then returned on an averaged basis to those employees since the net amount received by the employee could be less than the total of all tips initially earned by such employee, less 15 percent of such tips, plus $3.35.

Even where employees receive $3.35 an hour plus an amount sufficient to reimburse them for any loss of tips (by reason of an invalid tip pool, or otherwise), we would caution you that State, local or private contract law may provide a cause of action to recover employee tips. Our opinion is confined to potential violations of FLSA.

Finally, even if there is no minimum wage violation, the diversion of tips to an invalid tip pool may result in overtime violations where overtime work is performed. It is an established legal principle that statutory overtime cannot be said to have been paid to an employee unless

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[1] In the discussions we have had with your associates, the question arose as to whether tips are in fact given by the customer to an individual dealer or to a group, especially at the craps table. On the basis of the limited information available to date, we continue to be of the view that the tips are the property of the individual dealers who receive the tips (or possibly the crew of the craps table at the time the tip is received).

all the straight time compensation due for the nonovertime hours under the contract has been paid. 29 C.F.R. § 778.315; *Donovan v. Crisostomo*, 689 F.2d 869 (9th Cir. 1982). This means that, insofar as dealers have been deprived of tips received by them by reason of an invalid tip pooling arrangement, *all* such improperly diverted tips must be restored to them in any weeks when statutory overtime is worked. Otherwise, as the court reasoned in *Crisostomo*, an employer could effectively eliminate the premium paid for overtime by taking "kick backs" out of straight time wages in an amount equal to or greater than the overtime premium.

Thus, if in the case of dealers, the improperly diverted tips do not result in a net wage payment of less than the minimum wage, computed according to the principles illustrated above, and if the dealers work no overtime in a given workweek (or have any diverted tip amounts restored before the calculation and payment of the overtime premium), then the tip-sharing arrangement outlined in your letter would not be impermissible under the FLSA.

In your second question, you ask whether boxmen and floormen qualify as employees who "customarily and regularly receive tips . . . so that our client's proposed tip-pooling arrangement can be implemented without the consent of the dealers?" Apparently you do not contend that these classes of employees themselves customarily and regularly receive tips from customers. Your client believes, furthermore, that the general custom in the Las Vegas casino industry is *not* to require boxmen to share in tips nor for floormen to so share except perhaps at baccarat, although both employee categories may "furtively"

participate in tipsharing. (See FLSA section 3(t) for the definition of a "tipped employee.")

You also make reference to an opinion of the Nevada Attorney General and a case interpreting Nevada law as authority for your contention that boxmen and floormen qualify as employees "who customarily and regularly receive tips". (Opinion No. 80-A, 1980 Op. Att'y Gen. Nev. 206 (March 21, 1980); *Moen v. Las Vegas International Hotel, Inc.*, 402 F.Supp. 157 (D. Nev. 1975), *aff'd without opinion*, 554 F.2d 1069 (9th Cir. 1977)). According to your letter, the Nevada Attorney General stated that "[p]ooling of all tips received on a 24-hour basis by dealers, including boxmen, floormen, . . . " is one "of the [tip-pooling] systems currently used in Nevada Casinos." The opinion does not, however, state that this practice is sufficiently widespread so that such employees could properly be characterized as *customarily* receiving tips. Similarly, the *Moen* court analogized floormen, boxmen and cashiers to busboys in a restaurant, in reasoning that tips are intended for such employees as well as for the dealers. The court, however, was addressing a question of Nevada law and did not directly answer the question of whether floormen, boxmen and cashiers "customarily and regularly receive tips."

On the basis of this information, therefore, we are unable to conclude that boxmen and floormen customarily and regularly receive tips themselves or share in pooled tips.

We also wish to alert you to a potential problem in computing the "regular rate" of boxmen and floormen for purposes of statutory overtime. When employees are required to distribute their tips to employees who do not

customarily and regularly receive tips, such monies lose their character as tips and become in effect a form of employee compensation under the direct control of the employer. Under such circumstances, it is our position that such payments must be included in the regular rate of such ineligible recipients for overtime purposes. Similarly, to the extent employees are required to contribute a net amount in excess of 15% of tips to other tipped employees, such excess redistributed tips must be included in the recipients' regular rate. Of course, if the boxmen and floormen are otherwise exempt from the overtime requirements of the Act, e.g., as executive or administrative employees under section 13(a)(1), their participation in such a tip-sharing arrangement would not violate the Act's overtime provisions. we express no opinion as to whether these employees would meet the exemption criteria set out in 29 C.F.R. Part 541.

This leads to your final question concerning whether it would be a violation of FLSA to impose, as a term and condition of either prospective or continued employment with the casino, that each dealer agree in advance to sign an agreement authorizing the proposed tip-pooling arrangement with the boxmen and floormen.

When this type of "take it or leave it" approach has been at issue, the Department has not hesitated to assert that such a situation is not voluntary and uncoerced. Thus, in *Donovan v. Tavern Talent and Placements, Inc.*, 104 LC § 34, 773 (D. Colo. 1986), the Secretary successfully challenged a requirement which would have predicated employment on the execution of an agreement to turn over to the employer all tips pursuant to a "tip back" scheme. Similarly in *Brennan v. Haulover Shark & Tarpon Club, Inc.*, 105

LC § 34, 871 (S.D. Fla. 1986), *aff'd without opinion*, 877 F.2d 973 (11th Cir. 1989), the court invalidated an employer-imposed requirement which "made clear to each of the employees that unless they signed the agreement they would not be hired and could not be employees of the club" (105 LC at 44, 771).

A tip pool such as this which would otherwise be invalid would be permissible under FLSA only if the tip pool were fully voluntary, employee-initiated and free of any coercion or other influence from the employer, and not a condition of employment. Further, such a pool would need to be mutually agreed among the employees and outside any formalized arrangement.

This opinion is based exclusively on the facts and circumstances described in your request, including the fact that no tip credit is being taken, and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of FLSA.

We trust that the above information is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator

MANAGEMENT TIPS

DATE	BUCCI	DAMICO	HANEY	PEER	McKEE	WAHL
6/15/91	* (1401.57) From 5/15	*(1302.01) From 5/15	* (976.81) From 5/15			
6/30	* (869.23) From 5/31	*(1371.88) From 5/31	* (492.40) From 5/31			
7/15	3023.--	1829.36 From 6/15	1252.06 From 6/15			
7/31	941.20	1223.50 From 6/30	653.75 From 6/30			
8/15	795.93 From 7/15	985.57	670.52			
8/31	1357.44 From 7/31	1961.04	864.81			
9/15		778.46	500.16			
9/30		576.83	887.12			
10/15		}	}			
10/31		}	}			
11/15		} 8437.05	} 5720.56			
11/30		}	}			
12/15		}	}			
12/31		}	}			
1991 TOTALS	6117.57	15791.81	10548.98			
1/15/92		}	}			
1/31		}	}			
2/1		} 5412.32	} 6546.23			
2/29		}	}			
3/15		}	}			
3/31		}	}	(4/1/92)		
4/15		}	780.39			}
4/30		}	1125.87 (5/1/92 Sr. Banquet Capt.)			
5/15		} 6050.94		375.-- From 4/15		} 6190.50
5/31		}		300.00 From 4/30		}

EXHIBIT 9

EXHIBIT 9

DATE	BUCCI	DAMICO	HANEY	PEER	McKEE	WAHL
6/15		}Retired 6/15		50.-- From 5/15		}
6/30		}		913.23 From 5/32		}
7/15/92		}		}		}
7/31		}		}		}
8/15		} 3807.07		} 1638.--		}
8/31		}		}		} 5481.25
9/15		}		}		}
9/30		}		}		}
10/15		550.--		}		
10/31				}		
11/15/92				} 3185.--		8243.31
11/30				}		
12/15				}		
12/31				}		
1992 TOTALS		15820.33	8452.49	6461.23		19915.06
1/15/93				}		}
1/31				}		}
2/15				} 4752.--	(2/23/93)	} 8856.00
2/28				}		}
3/15				}		}
3/31				} 6625.-- Bonus Week Paid from Tip Share	477.30 + 533.34 Adj. From Tip Share	}
4/15				}	}	}
4/30				}	}	}
5/15				} 2336.--	} 6193.45	}
5/31				}	}Plus --	}
6/15				}	} 1300.02	}
6/30				}	}	}
7/15				}	}	}
7/31				}	}	}

DATE	BUCCI	DAMICO	HANEY	PEER	McKEE	WAHL
8/15				} 1998.--	} 5112.35	} 6110.25
8/31				}	} Plus -	}
9/15/93				}	} 1300.02	}
9/30				}	}	}
10/15				}	}	}
10/31				}	}	}
11/15				} 2789.--	} 6416.80	}
11/30				}Plus -	} Plus -	} 7557.05
12/15				} 3750.--	} 649.97	}
12/31				} 625.-- Pay Period Adjustment from Tip Share	}	}
1993 TOTALS				22250.--	21983.25	29933.40
1/15/94				}	}	}
1/31				}	}	}
2/15				} 3625.--	} 7368.55	} 8317.50
2/28				}Plus -	} Plus -	}
3/15				} 3750.-- as	} 1569.25	}
3/31				} above.	}	}
4/15/94				300.-- + 625.--	962.10	1128.--
4/30				$9000. Bonus Check Paid from Tip Share	926.90	882.95
5/15				300.--	1186.95	1114.30
5/31				975.--	1507.45	1809.85
6/15				550.--	1206.75 From 5/15	1274.55 From 5/15
6/30				1450.--	1757.80 From 5/31 +866.68	2302.35 From 5/31
				19695.--	17352.43	16834.50

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